United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To Be Argued By:
RALPH McMURRY

75-2586

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel.
WILLIAM PUTMON,

Appellant,

-against-

ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Appellee.

----------X

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

Preliminary Statement

This is an appeal from an order of the United States District Court for the Western District of New York, Burke, J., entered November 18, 1974 and denying after an evidentiary hearing appellant's petition for a writ of habeas corpus. On February 13, 1975, this Court granted a certificate of probable cause and assigned counsel.

Questions Presented

1. Whether the District Court applied the correct legal standard in determining appellant's competency to plead guilty?

2. Whether the District Court's conclusion that appellant was competent to plead guilty was supported by substantial evidence?

Statement of Facts

On September 30, 1970, appellant was arraigned in Monroe County Court on charges of burglary third degree and petit larceny. On May 18 and 19, 1971, a psychiatric examination of appellant was conducted to see if appellant was competent to stand trial. The examining psychiatrist, in a report dated May 20, 1971, concluded that appellant was a "confused and bewildered person" who lacked understanding of the charges against him and lacked the ability to assist in his defense because he was "anxious, confused, and pressured." Accordingly it was concluded that appellant was not competent enough to proceed in his trial. ("Dvorin report", petitioner's exhibit "D"). The report also noted, however, that "there are certain qualities of his presentation which suggest . . . a feigned ignorance."

As a result of the Dvorin report, appellant was transferred to Rochester State Hospital several days later. At the hospital further psychiatric examinations were conducted. Dr. Iapaolo filed a report dated June 21, 1971. ("Iapaolo report", petitioner's appendix "E"). The report concluded that with a reasonable medical certainty appellant was aware of the nature of the charges against him, understood the proceedings, and could aid in his defense. The report stated that appellant was no longer in need of observation and treatment and should be removed from the hospital.

The report was based on examinations by two psychiatrists on various occasions, physical examination, psychodiagnostic tests, laboratory tests, and an EEG at another hospital. The report found that appellant had "good contact with reality" with "no psychotic behavior noted"; that he had been very cooperative in the hospital and adjusted to his new environment; that there was no evidence of psychopathology; and that his abstract abilities were quite adequate. The report noted there was no previous record of previous admissions to a mental institution.

Appellant was returned to jail on June 24, 1971, having spent approximately one month at Rochester State. The following day appellant was arraigned in Monroe County Court on a new indictment charging rape. Appellant pleaded not guilty.

Subsequently appellant was examined by two psychiatrists once again, this time on the question of appellant's suicidal intent. On July 16, 1971, their report ("Ferris report", appellant's appendix "F") was submitted. The report noted that although the content of appellant's speech was bizarre, there was no dissociation. The report further observed that appellant's story was "logical and coherent". The report concluded that appellant "could" be suffering from paranoid schizophrenia, but that much of his behavior was a clear manipulative effort to get out of jail. It was stated that hospitalization was not warranted.

On both indictments, appellant was represented by the same retained counsel throughout the proceedings. Appellant was found guilty of the burglary charge after a trial in August, 1971. In October, 1971, appellant pleaded guilty to the crime of attempted rape in satisfaction of the indictment charging rape. Appellant stated he was satisfied with his counsel and counsel indicated there was no question in his mind about the propriety of the plea. (Appendix, 3, 4, 6). The court elicited from appellant the factual basis of the plea, and prior to accepting the plea found appellant competent based on the previous psychiatric examinations. Petitioner's counsel never requested a mental examination either at the plea or the sentencing.

Post-Conviction Proceeding in State Court

On January 3, 1973, appellant filed a petition for a writ of error coram nobis to vacate the judgment of conviction rendered on October 20, 1971 (conviction for attempted rape) on the ground that he was incompetent when he entered his plea of guilty. The application was denied by the Monroe County Court in a written decision dated April 5, 1973. On May 16, 1973, the Appellant Division, Fourth Department, denied leave to appeal, and leave to appeal to the Court of Appeals was denied July 13, 1973.

Petition for a Federal Writ of Habeas Corpus

Appellant then filed a petition for a federal writ of habeas corpus in the United States District Court for the Western District of New York. On December 12, 1973, Judge Burke denied the petition without a hearing based on his findings of facts and conclusions of law (Appellant's appendix "G"). Judge Burke also denied a certificate of probable cause.

Appellant then filed a motion for a certificate of probable cause in this Court. This Court granted the motion on June 21, 1974, to the extent of remanding the case for a hearing to determine appellant's competence at the time of his guilty plea.

Evidentiary Hearing in Federal Court

Counsel was assigned to represent petitioner, and an evidentiary hearing was held before Judge Burke on September 9, 1974.

Counsel for appellant called two witnesses. Dr. Dvorin, who prepared the first competency report, and Dr. Iapaolo, who prepared the second competency report. Both reports were introduced into evidence.

Dr. Dvorin testified he examined appellant by himself on May 18, 1971, for approximately one hour and with another doctor the following day for approximately 30 to 45 minutes (7. 13).* There was little factual evidence adduced at the hearing that was not in the report. The witness also testified that appellant, while incompetent in May, 1971, could well have been competent to stand trial four months later and that his mental condition was the type that could come and go.

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* Numbers are page references to hearing minutes.

Dr. Iapaolo testified that his analysis of appellant's competency to stand trial covered a time span covering the entire time appellant was in the State hospital, approximately a month (21). The case was discussed daily with a social worker and psychologist. The observations of staff nurses, who saw him every day, (22-23) were monitored. The witness himself examined appellant several times during that month. He was unaware of Dvorin's report, but agreed with Dr. Dvorin that appellant's mental condition could change over time, (25-27).* Beyond this, little factual evidence was adduced that was not also in Dr. Lapaolo's report.

The State called no witnesses.

Opinion of the District Court

In a decision dated November 15, 1974, Judge Burke made extensive findings of fact and conclusions of law. Appendix, C. He concluded that appellant was mentally competent at the time he entered his guilty plea, had sufficient ability to consult with his retained counsel, and understood the proceeding against him and understood the nature and consequences of his plea.

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* Appellant's brief claims Dr. Iapaolo was unaware that rape charges had been "filed" against appellant when he wrote his report - (Pet. Br. 4). Since according to appellant rape charges were not "filed" until June 25, 1971 (Br., p. 3), and Dr. Iapaolo's report was dated June 21, 1971, it is obvious why Dr. Lapaolo was unaware of any rape charges against appellant: such charges evidently hadn't yet been filed.

POINT I

THE DISTRICT COURT APPLIED THE CORRECT LEGAL STANDARD IN DETERMINING APPELLANT'S COMPETENCY TO PLEAD GUILTY

Appellant argues in Point Two of his brief that the District Court in denying the writ applied the wrong legal competency standard.* This position is without merit.

The District Court concluded that appellant was mentally competent at the time of his plea, that he had sufficient ability to consult with his lawyer, and that he understood the proceedings against him and the nature and consequences of his plea. In so concluding, the District Court was simply applying the competency standard that has hitherto been uniformly and historically accepted as the applicable law. Note, Competence to Plead Guilty: A New Standard, 74 Duke Law Journal 149, 155; Dusky v. United States, 362 U.S. 402 (1959); Criminal Procedure Law § 730.10; former Code of Criminal Procedure § 662; United States v. Mercado, 469 F. 2d 1148 (2d Cir. 1972); United States v. Valentino, 283 F. 2d 634 (2d Cir. 1960).

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* In cases of this kind this Court has held that in reviewing a District Court's disposition of a petition for a writ of habeas corpus, this Court's function is to determine whether (1) the District Court applied the controlling legal standard and (2) if so, whether its factual findings were not clearly erroneous. Accordingly respondent in this brief addresses these issues in their proper order. United States ex rel. Curtis v. Zelker, 466 F. 2d 1092 (2d Cir. 1972).

Appellant, however, asserts that this was the wrong standard. Appellant's position is in effect an invitation to this Court to adopt the position taken recently by the Ninth Circuit, namely that the standard for competence to plead guilty is higher than the standard for competence to stand trial. Sieling v. Eyman, 478 F. 2d 211 (9th Cir. 1973). That invitation must for sound reasons be declined.*

Appellant's position is based on the theory that a guilty plea involves a waiver of multiple rights, and purports to find authority in Westbrook v. Arizona, 384 U.S. 150.

In Westbrook, the accused, who was charged with murdering a lawyer, was found after a competency hearing competent to stand trial. The defendant than waived counsel and proceeded to conduct his own defense. The United State Supreme Court, in a very short opinion, reversed and remanded because there was no hearing or inquiry into the defendants' competence to waive his constitutional right to counsel and proceed to conduct his own defense.

* Appellant's attorney in the District Court never asked that Court to apply the Ninth Circuit's standard. Accordingly, since the issue was never raised below, appellant's argument is not even properly before this Court.

Westbrook did not state that there was a different standard or degree of competence required to waive counsel and proceed pro se. It follows that Westbrook similarly did not enunciate a separate standard or degree of competence to plead guilty. Indeed, Westbrook did not even mention guilty pleas. Westbrook stands only for the proposition that where a defendant's competency has already been put in issue by a mental examination and the defendant then announces a wish to waive counsel and proceed pro se, a further inquiry must be held. Nothing was said about a new standard to be used in that inquiry.

The Supreme Court never indicated how Westbrook's second competency hearing should differ from the first. If the Supreme Court had intended to announce a new standard in Westbrook it would surely have announced what that standard was. On the basis of Westbrook, therefore, it is impossible to presume a new competency standard. Thus the Ninth Circuit was completely mistaken in expansively reading Westbrook to imply a separate and higher standard of competence for guilty pleas. The correct reading of Westbrook limits its holding to cases where, as in Westbrook, a defendant found competent to stand trial after examination then announces he wishes to proceed pro se, Splitt v. United States, 364 F. 2d 594 (6th Cir. 1966), cert. den. 385 U.S. 1019, in which case a new inquiry (but not a new standard) is required.

Appellant invites this Court to create a new standard of mental competence, but gives no indication as to how, as a practical matter, this competence is to differ from the present standard of competence, except that the new standard should be "higher". Fine differences in level and degrees of competence, however, may not even be scientifically ascertainable. The uncertainties and tentativeness of psychiatric judgments, a problem long recognized by the Supreme Court, Greenwood v. United States, 350 U.S. 366, 375 (1956), already presents sufficient difficulties without the necessity of compounding them by adding new degrees of competence.

It is significant that appellant nowhere indicates why the present mental competence standard is insufficent to determine competence to plead guilty. In fact there is no basis for supposing that a defendant with the mental competence to stand trial does not also possess the mental competence to participate in proceedings of other kinds, such as a guilty plea. To suggest that a higher standard of competence is necessary because a guilty plea waives multiple rights is a complete non-sequitur.

This Court should reject such an untenable approach. No other Circuits have adopted it. One sister Circuit has already rejected it. United States v. Harlan, 480 F. 2d 515 (6th Cir. 1973). The Ninth Circuit's approach has been sharply and persuasively criticized. Note, Competence to Plead Guilty: A New Standard, 1974, Duke Law Journal 149.

POINT II

THE DISTRICT COURT'S CONCLUSION THAT APPELLANT WAS COMPETENT TO PLEAD GUILTY IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Having determined that the District Court applied the controlling legal standard, the only remaining issue is whether appellant has met his burden of showing that the District Court's conclusion that petitioner was competent to enter his plea in 1971 was clearly erroneous. United States ex rel. Curtis v. Zelker, supra. Petitioner has failed to meet his burden, since there was substantial evidence to support the District Court's conclusion.

As the District Court noted, the second psychiatric examination, which found petitioner competent, was for more extensive in both depth of data and time span of observation than the first psychiatric examination. See statement of facts, pp. 6-7 supra. Moreover, petitioner had the same retained counsel in both indictments for the entire duration of the proceedings. Counsel made no request for a mental examination at either the plea or the sentence. Counsel's opinion is of significant probative value in a determination of competency, and the United States Supreme Court has recognized that judges must depend to some extent on counsel in these matters. Drope v. Missouri, 43 USLW 4248, 4252 (1975); United States ex rel. Curtis v. Zelker, supra. The fact that there was conflicting evidence before the court obviously did not mandate a finding of incompetency; it is the function of the District Court to weigh all the evidence before it. Indeed a finding of competency to stand trial is not inconsistent with a finding of incompetency at a prior time. See United States v. Mercado, supra. It certainly cannot be said under all these circumstances that the District Court's' conclusion was wholly erroneous.

Appellant nonetheless claims that his guilty plea was invalid because (1) there was no contemporaneous determination of petitioner's mental competence and (2) it was entered at a time when there was substantial evidence to indicate that he was incompetent. Petitioner concludes that the state court was bound to order a new mental examination before accepting the plea and even claims that the evidentiary hearing in federal court was itself "invalid". Appellant's arguments are devoid of merit.

Petitioner is incorrect when he states there was no contemporaneous determination of his competency. There were three psychiatric reports made prior to petitioner's plea, two of them specifically directed to the issue of his competency to stand trial. That these latter reports were prepared four or five months prior to the plea does not render them non-contemporaneous. Counsel's failure to make any mention of any mental problem during the whole of these proceedings is also contemporaneous evidence of substantial significance. See, p. 13 supra.

There was not sufficient evidence of mental instability before the court to require the court, as a matter of constitutional law, to order another mental examination. Whether to order a second examination is discretionary with the trial court. United States v. Cook, 418 F. 2d 321 (9th Cir. 1969).

In particular, the state trial court was not required to order another examination simply because the two prior examinations had reached different results.* It is well settled that a decision to order a competency examination is within the discretion of the trial court and an examination is not compelled under Pate v. Robinson, 383 U.S. 375 (1966), even where there is substantial evidence of prior mental instability. United States ex rel. Roth v. Follette, 455 F. 2d 1105 (2d Cir. 1972); United States ex rel. Rizzi v. Follette, 367 F. 2d 559 (2d Cir. 1466); Jordan v. Wainwright, 457 F. 2d 338 (5th Cir. 1972). Here it is noteworthy that appellant had no prior history of mental instability, the second psychiatric competency report was of greater probative value then the first (pp. 6-7, 13, supra)**, and appellant's counsel made no request for an examination.

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* Petitioner's reliance on CPL 730.30 is wholly misplaced. That section requires a competency hearing only where psychiatric examiners conducting the same examination are not unanimous in their conclusion. Here the psychiatrists on both examinations were unanimous in their conclusions. The reports are full of cases finding competency despite conflicting psychiatric evidence. See United States v. Mercado, supra.

** Presumably the Ferris report was also before the state trial court, which had concluded that appellant was "logical and coherent", that his behavior was clearly manipulative, and that further hospitalization was not warranted.

Moreover, contrary to petitioner's claim, it is insignificant that both psychiatric reports were based on examination relating to the burglary charge, and not the rape charge. Psychiatric examinations are meant to assess the ability of defendants to comprehend and assist in the defense of criminal charges generally. Psychiatrists are not lawyers and cannot explore legal ramifications of particular criminal charges. The District Court was clearly correct in asserting that to require a new psychiatric examination simply because a new indictment had been filed would have been needless (5). It is significant that petitioner cites no authority for his proposition.

Assuming arguendo petitioner should have been granted a new competency examination before entering his plea, that defect was cured by the evidentiary hearing in the Federal District Court, which was held as a direct result of this Court's remand. Appellant claims that a hearing to determine his competency to enter a plea three years after the plea was insufficient under Pate v. Robinson, supra at 387 (1966), because here there was no contemporaneous evidence and the petitioner's psychiatrist witnesses only reiterated their earlier conclusions without stating the facts in which these conclusions were based. Appellant concludes that the hearing in federal court was inself "invalid".

These arguments are without merit. As already noted, the psychiatric reports are sufficiently close in time to petitioner's plea to stand as contemporaneous evidence, and counsel's failure to mention anything about a mental examination constitutes additional contemporaneous evidence.

The claim that the psychiatrists at the federal court evidentiary hearing only reiterated their conclusion in the reports, without going into the underlying facts, ignores the fact that the reports themselves were introduced into evidence at the hearing, and these reports referred to the facts on which the conclusions were based. Petitioner's claim that the petitioner's witnesses had no independent recollection of petitioner is not correct; there was no testimony to that effect at the hearing.*

Competency hearings years after the event are not unusual in this Circuit or other circuits. United States ex rel. Mayo v. LaVallee, 73 Civ. 2626, affd. ____ 2d ____ (2d Cir. 1974) [competency hearing nine years later] Miranda v. United States, 458 F. 2d 1179 (2d Cir. 1972)[competency hearing two years later]; United States v. Valentino, 283 F. 2d 634 (2d Cir. 1960)[competency hearing 20 years later]; Lee v. Alabama, 406 F. 2d 466 (5th Cir. 1969)[competency hearing 20 years later].

* A reading of the minutes of the hearing in federal court strongly suggest that the two witnesses had independent recollections of appellant. E.g., pp. 10, 26, 28.

The mere fact that this Court remanded for an evidentiary hearing implies that such a hearing in this case was proper. If appellant's counsel believed no meaningful determination at such a hearing could be made, it was incumbent upon him to make this position known to the District Court. No such claim was made and it must be deemed as waived.

CONCLUSION

THE ORDER OF THIS DISTRICT COURT SHOULD BE AFFIRMED.

Dated: New York, New York
April 21, 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellee

RALPH McMURRY
Assistant Attorney General
of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MAGDALINE SWEENEY, being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Appellee herein. On the 21st day of April, 1975, she served the annexed upon the following named person:

LEGAL AID SOCIETY
5th Floor
United States Courthouse
Foley Square
New York, New York

Attorney in the within entitled appeal by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by them for that purpose.

Magdaline Sweeney

Sworn to before me this
21st day of April, 1975

Ralph T. McMurray

Assistant Attorney General
of the State of New York